

UNITED STATES DISTRICT COURT

DISTRICT OF ALASKA

ROBERT PROBERT and LORETTA) Case No. 4:07-cv-00030-RRB
PROBERT,)
) Fairbanks, Alaska
Plaintiffs,) Friday, January 9, 2009
) 11:01 o'clock a.m.

vs.)

ORAL ARGUMENT ON SECOND
MOTION FOR PARTIAL SUMMARY
JUDGMENT (DKT 53)

FAMILY CENTERED SERVICES OF)
ALASKA, INC., JOHN W.)
REGITANO, KATHY CANNONE,)
SUSAN DALE, LONNIE HOVDE, and)
DEBORAH L. COXON,)
)
Defendants.)

GENE GRISSOM, SANDRA GRISSOM,)
DONNA GRIMES, JOHN GRIMES,)
LEONA MCDANIELS, KENNETH)
MCDANIELS, ERIC CLONINGER,)
DEBRA CLONINGER, LORETTA REES,)
TIMOTHY DECKER, and CARLA)
SMITH,)

Intervenor Plaintiffs,)

vs.)

FAMILY CENTERED SERVICES OF)
ALASKA, INC., JOHN W.)
REGITANO, KATHY CANNONE,)
SUSAN DALE, LONNIE HOVDE, and)
DEBORAH L. COXON,)

Intervenor Defendants.)

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE RALPH R. BEISTLINE
UNITED STATES DISTRICT JUDGE

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1 FAIRBANKS, ALASKA - FRIDAY, JANUARY 9, 2009

2 (Call to Order of the Court at 11:01 a.m.)

3 THE CLERK: All rise. His Honor the Court, the
4 United States District Court for the District of Alaska is now
5 in session, the Honorable Ralph R. Beistline presiding. Please
6 be seated.

7 THE COURT: Good morning.

8 MR. LOGAN: Good morning, Judge Beistline.

9 MR. WALLACE: Good morning.

10 THE COURT: So, nothing else to do in Fairbanks
11 today, huh, but come here?

12 MR. LOGAN: Staying here just for you. I'm leaving
13 at eight o'clock tonight for the warm weather.

14 THE COURT: Okay. What is the lighting? What's --
15 what's this lighting, just to add to the --

16 MR. LOGAN: The ambiance.

17 THE COURT: Okay. Well, I appreciate that. The
18 question we're -- it's Probert, et. al. v. Family Centered
19 Services, 4-7-30. Question is do the overtime provisions of
20 the 1938 Fair Labor Standards Act apply to employers of Family
21 Centered Services of Alaska? Plaintiffs say yes, defendant
22 says no. What's the answer?

23 MR. LOGAN: Well, obviously it's yes.

24 THE COURT: Okay. Why do you say so?

25 **PLAINTIFFS' ARGUMENT**

1 MR. LOGAN: Okay. The reason I gave you -- Miss, if
2 we can go ahead and focus a little bit better. 29 U.S.C.
3 203(r) and (s) are the sections that we're talking about. Your
4 Honor, I've given --

5 THE CLERK: I'm sorry to interrupt. Mr. Logan, if
6 you -- I'll need you to put the lapel mike on if you're going
7 to stand away from the mike.

8 MR. LOGAN: Where's the lapel mike?

9 THE CLERK: It's right at the front of the podium.

10 MR. LOGAN: Oh -- oh, there it is.

11 THE COURT: Okay.

12 (Pause)

13 MR. LOGAN: There we go. Sorry.

14 THE COURT: Okay.

15 THE CLERK: Much better. Thank you.

16 MR. LOGAN: I gave hard copies of this to the Court
17 and also to your Clerk so if that's helpful. Oh, and then you
18 even have the statute.

19 THE COURT: I have the book.

20 MR. LOGAN: Ah, hey. How can I get past that?

21 (Indiscernible) talked about enterprise liability, and what
22 they're saying is that under certain circumstances, a business
23 such as this is obligated to pay overtime.

24 Now, the last time we came before you with respect to
25 a motion for summary judgment, it had to do with mental illness

1 and a somewhat tight reading of that term. You decided that
2 there were questions in fact had to be decided before we'd be
3 able to go ahead and decide the issue. However, mental illness
4 is a subset of a larger group of behaviors known as sick.

5 THE COURT: 'Kay.

6 MR. LOGAN: Now, the Department of Labor has
7 promulgated a handbook called the Field Operations Handbook.
8 Department of Labor does enforcement of the Fair Labor
9 Standards Act, and this book -- or this -- I think it is a book
10 format, but the -- it's a fair -- as the handbook says that
11 sick here means infirm or the like. The trigger is going to be
12 infirm. The exact language which I had marked (indiscernible -
13 background noise) a second ago is: "A physical or mental
14 infirmity or sickness of any kind." As good as we can find,
15 nobody has addressed this issue in this -- in any jurisdiction.
16 But again, I repeat, "a physical or mental infirmity or
17 sickness of any kind." I shorthand that by calling it
18 infirmity.

19 This interpretation by the Department of Labor is
20 made for the sole purpose of enforcing the rules by their
21 enforcement personnel. As I said, mentally ill is a subset, if
22 we're going to accept the limited version of what mentally ill
23 says, of infirmity; however, it's a part of a larger set and an
24 overlapping one. Somebody can be mentally ill and still have a
25 mental infirmity without being mentally ill and falling within

1 the definition that's being promulgated by Youth Services.

2 Everything that we've gotten from them, not from us,
3 agrees with that interpretation. There's nothing in Section
4 203 to disagree; sick, infirm, there's no disagreement there.
5 The Department of Labor's Field Operation Handbook, as I
6 indicated, says infirmity means mental infirmity or sickness of
7 any kind. The common usage, which we talked about in the
8 briefing, talks once again about mental or physical infirmity.
9 That was the Webster's citation.

10 Now, let's take a look at client profile of who gets
11 into the Fairbank -- or the therapeutic family home, and I
12 boiled it down so we can just take a look for a second here.
13 All children admitted to the program will require stabilization
14 for mental illness and/or behavioral disorders -- this was part
15 of the 2004 hand -- or 2004 description, and I know of no
16 reason and they've presented no reason why it's no longer in
17 effect or that they're doing anything different -- or they're
18 suffering from a mental illness, or they need imminent
19 placement in a mental health facility, or they'll benefit from
20 stabilization and reduction or resolution of their mental
21 illness by being in the therapeutic family home. In other
22 words, they're infirm.

23 Who doesn't get in to the therapeutic family home?
24 Who doesn't count? Generally, they will not admit somebody
25 that simply requires temporary foster care, but who does not

1 require stabilization or treatment of a mental illness.
2 They're sick. They're at least sick if we use a broad
3 interpretation which is what we're supposed to use rather than
4 a limited interpretation which is what they've been suggesting
5 we use.

6 Now, Mr. Regitano, who's had quite a bit to say to us
7 about why these children are not mentally ill, in fact he's
8 said many things about that. Let me see if I can get this
9 right. He says that the children are experiencing emotional or
10 behavioral problems and are at risk of placement in
11 institutional facilities. Mr. Regitano says Medicaid pays for
12 services. Medicaid pays for medical treatment. It doesn't pay
13 for foster care. Medicaid -- or the primary purpose of the
14 family homes is an alternative for children at risk of being
15 institutionalized. Mr. Regitano said these children have
16 emotional and behavioral problems severe enough to make
17 institutionalization a risk.

18 Mr. Regitano said the children admitted to the family
19 home received clinical in-takes, functional assessments, and
20 evaluation by a mental health clinician. We could go into why
21 we use mental health clinicians instead of psychiatrists,
22 psychologists or physicians, but it might have a lot to do with
23 the fact that in 1966, we didn't have very many master degreed
24 mental health clinicians and had -- if Congress thought about
25 it, they probably would have included it.

1 However, if we go ahead, we accept this tight -- this
2 definition, we're still working with a mental health clinician
3 who's evaluating, assessing these children and creating a
4 diagnosis out of the -- under the rule that they have created.
5 They give them group therapy, they give them individual
6 therapy. The therapy's conducted by a clinician, not by a
7 psychiatrist, a psychologist or physician, but Mr. Regitano
8 says that a clinician can do this. That's certainly not
9 something you do for somebody who's not at least a little bit
10 sick or infirm.

11 He admits that there's a limited amount of therapy.
12 Mr. Regitano also says that master's level clinicians are what
13 he used at the family home -- or the family homes. The Youth
14 Services also has a contracted psychiatrist and at least some
15 of the kids receive medication. The children are evaluated by
16 a mental health clinician and provided with a diagnosis.

17 If I'm repeating myself a bit, it's because so did
18 Mr. Regitano. A moment, Your Honor.

19 (Pause)

20 | Thank you.

21 Common diagnoses: Attention deficit disorder,
22 depressive disorder, reaction -- reactive detachment disorder,
23 post-traumatic stress disorder, anxiety disorder, and a list
24 that if I recall correctly was about two inches long. Mr.
25 Regitano said that the children have emotional and/or

1 behavioral problems. He acknowledged that the children
2 admitted to the therapeutic family homes need a stable and
3 supportive residence, and have behavioral problems which if not
4 addressed, could ultimately develop into serious mental illness
5 and require institutionalization.

6 Mr. Regitano said that children with severe mental
7 illness would not be admitted to the therapeutic family homes.
8 We will talk about what severe emotional disturbance means
9 later, but I'm not quite sure that I see a big difference
10 between severe mental illness and severe mental -- and severe
11 emotional disturbance.

12 Mr. Regitano said that they all have an axis one
13 diagnosis, and I believe that an axis one diagnosis is actually
14 required if they're going to go ahead and get medicated.

15 We mentioned in the briefs that new hires are asked
16 how they're going to hand -- what problems they think that they
17 might have dealing with severely emotionally disturbed
18 children. Not foster kids that need a place to sleep, not
19 foster kids who don't have a good home to go to, but severely
20 emotionally disturbed children. If they don't qualify as
21 mentally ill, they're certainly ill or infirm.

22 Their policy and procedures manual -- let's see if I
23 get it right. Their client profile policies in their policies
24 and procedures manual says that children admitted to the
25 program will require stabilization for actions that are as a

1 result of mental illness and/or behavioral disorders. Their
2 client profile says:

3 "The children will have been determined through
4 clinical assessment to be suffering from a mental
5 illness not of an organic origin."

6 I might mention that I think the language has changed a little
7 bit ever since -- since about four years ago when they
8 discovered (indiscernible) is what I think really happened.
9 But this is what they originally said. There's been no
10 evidence to show that there's any difference in what really
11 happens in the world.

12 The policies and procedures manual says that these
13 kids are in imminent need of placement in a mental health
14 treatment facility, and it says that they've been determined by
15 the therapeutic family home admission review that placement
16 would be beneficial to stabilization or reduction or resolution
17 of their mental illness. As I indicated, they will not be
18 admitted if they do not require stabilization or treatment due
19 to mental illness. Those kids who are not in need of
20 stabilization or treatment because they have some kind of
21 mental illness are not admitted to the therapeutic family
22 homes.

23 Now, if we use the Youth Services definition, it says
24 you need a psychiatrist, a psychologist, or a physician. Then
25 we step outside of this box called infirmity and there's a

1 question of fact. But you don't need to step out there to
2 realize that they're sick, they're infirm, they're ill, and
3 that part of the box allows you -- in fact, requires that you
4 find that they have -- that they qualify under 203 and they
5 need to be paying these people overtime. There is no really --
6 there's no other reasonable interpretation.

7 Now, there's a couple of other issues that I need to
8 address, but I need to say it one last time because I'm not
9 capable of saying things only once --

10 THE COURT: See, the beauty of this is right now,
11 believe it or not, my law clerk is listening to every word
12 you're speaking from her office in Anchorage, and I'm going to
13 be able to listen to this many times over --

14 MR. LOGAN: I'm absolutely certain --

15 THE COURT: -- through the miracles of modern
16 technology.

17 MR. LOGAN: Right. And through the miracles of the
18 fact that I never can keep my mouth shut.

19 THE COURT: Well, okay.

20 MR. LOGAN: Bottom line, these kids are ill, they are
21 infirm as defined by a Field Operation Handbook which was
22 promulgated by the Department of Labor for enforcement
23 purposes. There's no other reasonable answer -- at least if
24 there is, I certainly don't understand it.

25 Now, I have to touch on a few things -- as soon as I

1 can read my writing.

2 In their opposition at page four, they quoted the
3 Field Operation Handbook, 12G02, and they gave you a little
4 title, but they ignored the language about infirmity of any
5 kind. They talked about Medicaid, giving us some definitions.
6 One of the interesting things in the definition is that you
7 determine what this program is by its overall character, not by
8 some very technical way of going about it, but by its overall
9 character. That's what Medicaid says. It's their cite. It
10 also seems to me like common sense.

11 Kitchings. Boy, we hear about Kitchings and we hear
12 about Kitchings, we hear about Kitchings. Kitchings is a
13 district court case in Florida. However, it's got some
14 interest, and one of the things is that Kitchings said that
15 they don't treat severely mentally ill children. What in the
16 world is severely emotionally disturbed other than severely
17 mentally ill? Maybe not by definition of psychiatrists or
18 psychologists or a physician, but they're severely emotionally
19 whatever you want to put at the end of it, illness,
20 disturbance, infirmity. It's severe and it's emotional. So,
21 Kitchings is halfway there for us.

22 All of the evidence equals infirmity, and all of that
23 infirmity is being treated by a very useful and very important
24 program in Fairbanks. I don't want to see them close their
25 doors, but there has to be a way to compensate these people at

1 the same time as following the law. We think that that means
2 there would be less turnover. And, you know, for these
3 children, every single time there's a new parent, there's a new
4 abandonment, there's a new change in who their role model is.
5 We think that if they can work out a way that the Fair Labor
6 Standards Act was meant to work out, they're going to keep
7 their help, and that's better for the kids.

8 If they were as creative in finding a way to pay
9 these people within the Fair Labor Standards Act as they are in
10 trying to get out of it, I don't think we'd be here and I think
11 they'd have a better program.

12 In any case, they had to send us the eleventh hour --

13 THE COURT: Well, I want to give Mr. Wallace a chance
14 to speak, too, and -- you know, and you've used already going
15 on twenty-five minutes, so finish your -- your thought.

16 MR. LOGAN: I think maybe I better just keep my
17 thought.

18 THE COURT: Okay. I just want to make sure we get
19 equal time. You know, I remember years ago I was trying to
20 convince Judge Van Hoomissen of something, and I finally had to
21 graph it out for him and he understood it. So, I'm trying to
22 graph out in my mind this whole thing. I understand that 1938
23 Congress -- that's over seventy years ago, Congress enacted the
24 Fair Labor Standards Act, which required certain employees
25 involved in interstate commerce to pay -- certain employers in

1 interstate commerce to pay its employees overtime. And what
2 we're doing here today is trying to determine out -- determine
3 whether Family Centered Services of Alaska falls within the
4 category of those employees. And so I'm trying to chase down
5 exactly how we get here.

6 You've moved way down to -- the dispute between you
7 two gentlemen is way down the list, and that is whether or not
8 -- and that's what you've been talking about today.

9 MR. LOGAN: I can take you there.

10 THE COURT: Well, I think I've pretty well gotten
11 there, but if you can take me there in a minute, that' would be
12 helpful.

13 MR. LOGAN: I'll take you in ten. In 1966, Congress
14 changed that law some, and what they said was if you're engaged
15 in certain be -- in certain activities, then you will have what
16 is known as enterprise -- enterprise liability, enterprise --
17 instead of being interstate commerce, we're going to define
18 this as this enterprise does meet interstate commerce.

19 THE COURT: Okay. All right.

20 MR. LOGAN: Okay? And in order to get there, you
21 have to file within these categories of people.

22 THE COURT: And that's what we've got here.

23 MR. LOGAN: And that's what we get for now. It's
24 simple enough. It didn't exist between nine -- in 1965, we
25 could not (indiscernible). In 1966, we were included unless it

1 means something completely different than the way it was
2 written. Does that get you there?

3 THE COURT: That gets me there.

4 MR. LOGAN: Thank you, Your Honor.

5 THE COURT: All right. You'll have a chance to
6 respond --

7 MR. LOGAN: Nothing further from me until --

8 THE COURT: -- but I -- I think Mr. Wallace came all
9 the way over here. You wanted to speak, right?

10 MR. WALLACE: Your Honor, I don't care to speak. Ms.
11 Ringstad's going to argue on our behalf. Thank you.

12 THE COURT: Oh, okay. All right. Very well. Okay.

13 MR. LOGAN: Thank you, Your Honor.

14 THE COURT: All right.

15 MR. LOGAN: Sorry.

16 **DEFENDANTS' ARGUMENT**

17 MS. RINGSTAD: Your Honor, in preparing for this
18 hearing, I did do some extra research just a couple days ago,
19 and I did find a case that hadn't been cited before. I filed
20 this supplemental citations --

21 THE COURT: Mm-hmm (affirmative).

22 MS. RINGSTAD: -- and the case did talk about the
23 1966 amendment, and basically it said that --

24 THE COURT: Is that the supplemental authority you
25 filed? Is that --

1 MS. RINGSTAD: The case was, yeah.

2 THE COURT: Okay.

3 MS. RINGSTAD: It's Jacobs v. New York Family
4 Hospital, and it did involve a family home, but they were
5 trying to be brought within coverage on the basis they were
6 associated with a state agency, which is a different activity
7 that we're bringing within, but the same -- same subsections,
8 203(r) and (s). And what the court said is that the extension
9 of coverage was intended to be narrow instead of broad with
10 respect to these non-profit organizations, and the reason was
11 they -- they -- they had specified just a few activities that
12 would bring them within coverage because those were the
13 activities that accompanied the businesses.

14 THE COURT: Okay. What case are you citing now?

15 MS. RINGSTAD: It's Jacob v. New York Family
16 Hospital --

17 THE COURT: Okay.

18 MS. RINGSTAD: -- 483 F. Supp. --

19 THE COURT: Okay.

20 MS. RINGSTAD: -- 251. If you have the supplemental
21 citations, it's on the second page.

22 THE COURT: I have it right in my -- front of me.

23 MS. RINGSTAD: Yeah. And that is the only case I
24 have been able to find talking about that (indiscernible)
25 history of those amendments.

1 THE COURT: 'Kay.

2 MS. RINGSTAD: Okay. Family Centered Services
3 operate their family homes as residential child care
4 facilities; that's how they're licensed. They provide a home
5 for children that have emotional and behavior problems.
6 Another key element is that they have no safe and stable home
7 or foster home. These children have no home that can help them
8 deal with their problems; therefore, they have the family homes
9 with the therapeutic (indiscernible) parents that are supposed
10 to be modeling (indiscernible) behavior and helping them shape
11 the behavior and then control their emotions and their life
12 skills.

13 Another key factor that they not be suffering from a
14 serious mental illness because they're not equipped to handle
15 children with severe mental illnesses. And if the children are
16 seriously ill, they will not be admitted to the home, they're
17 moved and placed in an institution.

18 The fourth thing that they don't require
19 institutional -- institutionalization or restricted
20 environment. These kids -- the homes are set up like private
21 homes, the kids attend public school, they ride the school
22 buses, they attend after-school activities and community
23 events. Their (indiscernible) involves new life skills,
24 attending school, educational support, community activities.
25 The therapy they -- they receive is very limited. They meet

1 twice a week for two hours each time, so two hours a week, in a
2 group with the other members of the home so the kids can
3 discuss their living arrangements, and they receive one hour of
4 therapy -- individual therapy each week. That's all the
5 therapy they receive.

6 They are not admitted to a home based on any kind of
7 a thorough -- or evaluation by psychiatrists or psychologists
8 or a physician. They are evaluated by clinicians after they're
9 admitted, and the clinicians are basically licensed -- they
10 licensed social workers. They see a psychiatrist only if their
11 medication is (indiscernible) for any kind of treatments.

12 Now, under the Fair Labor Standards Act, non-profits
13 are covered only if they are engaged in the care of the sick,
14 the aged, the mentally ill, or defective. There is no
15 indication that Congress listed those with the intent of
16 including mental illness as a subset of the sick. Those are
17 listed separately. And I believe the common sense definition
18 of sickness would be physical sickness, especially where they
19 separately listed mental illness.

20 If they intended for children with emotional
21 disturbances that were not serious enough to constitute a
22 mental illness to be included, they would have separately
23 listed emotional disturbed children as within coverage.

24 Now, the Department of Labor's Field Operation
25 Handbook -- I cited some cases yesterday in the supplemental

1 citations -- is not entitled to the kind of deference that is
2 given to agency regulations. It's simply a handbook to help
3 their employees that enforce the laws, and this Court may
4 decide it's persuasive or not persuasive.

5 The provisions in the handbook addressing children
6 provide that there is no coverage for a non-profit caring for
7 neglected independent children unless it is a hospital, covered
8 institution, or school.

9 The provision addressing emotional -- persons with
10 emotional disturbances requires that more than fifty percent of
11 the residents be admitted or evaluated by a physician,
12 psychiatrist or psychologist. In this case, the kids were not
13 evaluated or admitted by a physician, psychiatrist, and
14 psychologist, indicating that the conditions were not serious
15 enough -- the conditions were not serious enough to require
16 admission or evaluation by a physician, psychiatrist, or
17 psychologist. The conditions did not constitute mental
18 illness, sickness, or defective under coverage in the Field
19 Operations Handbook.

20 I think that test is basically to sort out emotional
21 disturbances instead of serious -- having emotional
22 disturbances that are not serious. In this case, they were not
23 serious enough to require admission or evaluation by a
24 psychiatrist, psychologist, or physician.

25 Now the section that they rely on in the handbook is

1 12G02, where there is some (indiscernible) language, but that
2 is not a section that's defining sickness or mental illness.
3 It doesn't define sickness as including any infirmity, and it
4 doesn't negate the requirement that the residents must be the
5 sick, the aged, or the mentally ill or defective.

6 The focus must be on whether residents are the sick,
7 the aged, or (indiscernible) defective. And in the case --
8 (indiscernible) cases was Kitchings and Bowen (ph):

9 "Coverage did not extend to children who were
10 residing in family homes with house parents, went to
11 the public schools, and who received limited
12 therapy."

13 In the Bowen case, the court distinguished between there are
14 homes -- where the children resided in homes, attended school,
15 and did receive limited therapy from their homes that were said
16 to (indiscernible) serious mental illnesses. It was only the
17 later homes that dealt with children with serious mental
18 illnesses that were covered by the act.

19 And the court distinctly said that the
20 (indiscernible) -- described as created specifically addressing
21 children with severe mental health and not behavioral health
22 commissions. The program employed psychiatrists,
23 psychologists, social workers, and nurses to attend to the
24 residents' mental health needs, none of which is in --
25 (indiscernible) in the family homes. And by the home's own

1 admission, fifty to seventy-five percent of its residents
2 suffered from a severe mental illness.

3 The court considered the nature of the population,
4 the type of the care provided by the home, and that -- the
5 factors for admission. And the state found this consistent
6 with the department (indiscernible) approach, looking at the
7 nature and the amount of services provided by the non-profits.
8 And looking at the services provided here, I don't believe any
9 of those services would be the type of services that would be
10 treating the mentally ill.

11 And the plaintiffs have the burden of proving that
12 Family Centered Services fell within 203(r) and (s). And in
13 the absence of any evidence that the children were mentally ill
14 or physically sick, they should not be granted summary
15 judgment. In fact, summary judgment should be granted in favor
16 of Family Centered Services.

17 THE COURT: Okay. So you want -- you want summary
18 judgment in your favor.

19 MS. RINGSTAD: I think -- I think that -- yes.

20 THE COURT: Okay. I'm not -- I don't mean okay, I
21 mean okay, it's Mr. Logan's turn.

22 MS. RINGSTAD: Is there anything -- any questions?

23 THE COURT: No, I -- I'm not going to make a decision
24 today if that's what you think. I'm still working on this.
25 I've got books -- you know, I've got law clerks searching --

1 this is not something we deal with every day.

2 (Pause)

3 Why don't they just make it clear so that I don't have to spend
4 all this time wading through these things and trying to figure
5 out what someone else meant forty years ago?

6 MR. LOGAN: Because they did it twenty years ago --

7 THE COURT: Okay.

8 MR. LOGAN: -- and because it's Congress.

9 THE COURT: Okay.

10 **PLAINTIFFS' REBUTTAL ARGUMENT**

11 MR. LOGAN: I'm going from memory. I believe that I
12 am correct, but this will be something that -- that somebody's
13 going to have to look up. My memory, compared -- combined with
14 somebody who helped me work on it, says that the reason that
15 they added -- they added these -- this scope of enterprise --

16 THE COURT: Mm-hmm (affirmative).

17 MR. LOGAN: -- in 1966 was to add to non -- to the
18 hospital model, non-profits. Prior to that time, the non-
19 profits were not there. That's your recollection. Okay.
20 That's two recollections. It doesn't mean it's right, but it's
21 better than one recollection. Okay.

22 Family Centered Youth Services goes back and re-
23 argues mentally ill as being this tight idea that you have to
24 have psychiatrists, psychologists, and physicians. We briefed
25 it to death and I'm not going to do it again. We just think

1 they're wrong. I mean, no, they could be right. If they're
2 right, they're still not going to get out of this because this
3 is an overlapping part of the set, and if I had been able to
4 figure out how to do VIN (ph) diagrams at three o'clock this
5 morning, you'd have one, okay?

6 THE COURT: That's all right.

7 MR. LOGAN: But I couldn't figure out how to get the
8 computer to do it. Let's talk about what the Field Operation
9 Handbook says just for a second.

10 THE COURT: Okay. I'm going to give you seven
11 minutes and Ms. Ringstad seven minutes --

12 MR. LOGAN: Okay. Thank you.

13 THE COURT: -- so everybody's -- fair time.

14 MR. LOGAN: Gotcha. Which says "suffering from
15 physical or mental infirmity or sickness of any kind." That's
16 very clear, the inter -- of any kind sort of gets me there.

17 THE COURT: They say that's not -- not authoritative
18 though.

19 MR. LOGAN: Well, she says it's not authority,
20 however, let's see why she says that. She says it's not
21 authority because she's saying, you know, handbooks aren't, and
22 she cites to a case called Brennan. In Brennan -- Brennan
23 talked about handbook with con -- consideration officers. I've
24 never really even heard of them, but apparently they have their
25 own handbook. And it said -- you look at it and you decide

1 whether or not it fits within the whole picture and give it the
2 weight its worth.

3 However, Brennan -- which by the way was in another
4 jurisdiction -- in 1974 also said this. It says:

5 "Courts would also lack prudence to dictate to the
6 Secretary exactly how to perform his duties which are
7 expressly within the expertise of the Secretary of
8 this Department."

9 So, whether it's binding on (indiscernible) or I think it's a
10 line of cases that starts with a case called Skidmore. You're
11 supposed to take a real close look at it and would lack
12 prudence just to go ahead and ignore it. They meant something.

13 And this is -- the other -- let me point out one
14 other thing. They issued -- they mentioned another bunch of
15 cases. Those cases are talking about the informal letter of
16 opinion that people ask for so they can keep out of trouble;
17 how they spin it, how they don't spin it, doesn't matter. But
18 those cases, almost all of them talk about informal opinions --
19 opinion letters, and I believe that opinion letters really
20 aren't entitled to deference.

21 I think the rest are and I think that in the case of
22 an enforcement -- an enforcement handbook written by the people
23 that are doing the enforcement were there. Now let's see what
24 we've got to do with it. I tried -- quoted Eyre (ph) and it's
25 Eyre, and that's hard to get Eyre to -- there we go.

1 Eyre says two things that are important to you. It
2 says that:

3 "The Fair Labor Standards Act grants the Secretary
4 broad authority to define and delimit the scope of
5 the exemption for executive, administrative, and
6 professional employees."

7 It's the same -- it's the same deal. We're talking about the
8 fair -- the Secretary administering their own law. That's at
9 519 U.S. at 452, and I believe the page number -- well, it's in
10 there. Sorry.

11 Now, here's what's important because Congress has not
12 directly spoken to the precise question at issue. We must
13 sustain the Secretary's approach so long as it is based on a
14 permissible construction of the statute, and then they cite to
15 Chevron. This was a Ninth Circuit case in 1997 -- the briefs
16 are in there, but it's 519 U.S. at 452, and I'll leave it to
17 your law clerks to do the rest on them.

18 What they're saying here is that these kids aren't
19 sick enough to be called sick, they're not infirm, and that the
20 Field Operation Handbook should just be ignored. That's what
21 they're telling you to do, ignore it. Well, you shouldn't
22 ignore it. You should at least give it what it's due at the
23 very least, and since nobody else has said anything about it
24 and since all of their information and their own testimony says
25 there's something wrong with these kids, they can be helped by

1 these homes. These children are sick and they should be paying
2 their help at the therapeutic family homes overtime as required
3 by the statute. Is there anything else I can answer?

4 THE COURT: No. I'm just -- I'm thinking about on
5 the one hand, you've got a good policy (indiscernible) pay
6 employees fairly. On the other hand, you've got a good policy
7 that you want to encourage these very good institutions to keep
8 going. You don't want to -- you don't want to run them --
9 financially run them out of business, but you want to pay the
10 employees fairly, so --

11 MR. LOGAN: If they're going to tell you that they're
12 going to go out of business --

13 THE COURT: I don't know. I'm just -- I'm just think
14 -- no one's telling me anything. I'm just kind of thinking
15 about this whole thing.

16 MR. LOGAN: Right. Right. I know you're thinking
17 that, but it's up to them to give you some evidence that says
18 they're not going to be able to do it, and they haven't done
19 that.

20 THE COURT: No, I just -- okay.

21 MR. LOGAN: They haven't given you any evidence or
22 made the allegation that we can't economically do this. All
23 they're saying is it may be -- we'll have to give them more
24 money.

25 THE COURT: How come this -- this has not been

1 litigated before? You'd think that there would be all kinds of
2 cases on this.

3 MR. LOGAN: You know, that's what I was wondering.
4 This particular issue nobody's thought of, I suppose, or
5 nobody's ever gone past the mentally ill section. There's only
6 one case and that was down in Florida until recently --

7 THE COURT: Right.

8 MR. LOGAN: -- when that one was decided. That's it.

9 THE COURT: I see that.

10 MR. LOGAN: So, you're making new law, Your Honor.

11 THE COURT: Ms. Ringstad, what do you have to say?

12 MR. LOGAN: Thank you very much.

13 THE COURT: Thank you.

14 **DEFENDANTS' REBUTTAL ARGUMENT**

15 MS. RINGSTAD: Well, there are several Department of
16 Law -- Labor letters that were issued to non-profits, and most
17 of those indicate that there's no coverage. Some of them
18 qualify saying unless you're operating a hospital, a school, or
19 an institution.

20 THE COURT: So, how would -- what would generate a
21 letter like this? Why would --

22 MS. RINGSTAD: I think a non-profit writes in say
23 would you consider this --

24 THE COURT: Would you please tell us if -- is that
25 what you're saying? Someone writes the Department of Labor and

1 asks for an opinion?

2 MS. RINGSTAD: I think they ask their opinion.

3 THE COURT: Okay.

4 MS. RINGSTAD: I mean, I -- I did attach a -- one I
5 just found --

6 THE COURT: Mm-hmm (affirmative).

7 MS. RINGSTAD: -- to the supplemental citations.

8 THE COURT: Mm-hmm (affirmative).

9 MS. RINGSTAD: You know, I don't think, you know, the
10 -- the non-profit asks or writes to them in some fashion, you
11 know, will we be covered? You don't say on the basis of mental
12 illness. And I don't think that was -- the Department of Labor
13 has ever interpreted they're in this type of a family home in
14 the coverage on a basis that, well, if the kids aren't really
15 ill, then they must be sick in some fashion. I don't think
16 it's ever been -- that that section's ever been interpreted in
17 that manner, and that's why there's no cases on the -- on the
18 basis of sickness, and all -- the basis that it's been argued
19 is on the basis of mental illness and the distinguishing
20 factors and the type of treatment whether these -- the home was
21 provided -- was treating the mentally ill (indiscernible)
22 services that would cause it to do treatment of the mentally
23 ill.

24 And we know our therapy, I don't think the con -- was
25 -- amounts to that in all of these cases had kids that had

1 diagnoses and that we would see you in therapy. These are kids
2 without homes, so I would think in almost all cases, there
3 would be -- you would see some sort of diagnosis and some
4 therapy.

5 And we haven't asked the Court to ignore the handbook
6 that is not binding. I listed some cases, but there are a lot
7 of cases say it's not binding authority. This Court is free to
8 determine how persuasive the provisions are.

9 And the particular provision to beam the light on to
10 bring in the infirmity language -- as I said, is it defining
11 the term sick or mentally ill as any infirmity? It's -- they
12 did a test determining whether the institution was primarily
13 engaged in the sick -- the sick. And if you notice the clause
14 that talks about physical inter -- physical and mental
15 infirmity or sickness of any kind, is the clause such that --
16 with if. So in this case, unless the kids were either sick or
17 mentally ill or defective, we wouldn't be in this at all.

18 The aged -- it might mean something if you're talking
19 about the aged, that they would be in the home and might not be
20 suffering from any kind of sickness, but otherwise necessarily
21 they would be. So, I'm not sure this provision, especially the
22 way it's being interpreted, makes any sense to me at all.

23 THE COURT: Well, I -- the word aged I presume means
24 old --

25 MS. RINGSTAD: Yeah.

1 THE COURT: -- it doesn't mean old or very young, or
2 does it? I don't know. I'd have to look that up. Aged,
3 aged [pronounced age-ed].

4 MS. RINGSTAD: Aged. I --

5 THE COURT: I always thought it meant very old --

6 MS. RINGSTAD: I think --

7 THE COURT: -- but I haven't explored it.

8 MS. RINGSTAD: -- in everything I've seen, it was
9 referring to people that were old and in need of care.

10 THE COURT: Right.

11 MR. WALLACE: Don't give Mr. Logan any ideas.

12 THE COURT: No, I just was --

13 MS. RINGSTAD: And the term sick refers to
14 specifically sick. And if you look at (indiscernible) --

15 THE COURT: That's your opinion, but he doesn't think
16 so.

17 MS. RINGSTAD: Well, I don't think they would --

18 THE COURT: Yeah.

19 MS. RINGSTAD: -- list the broad and then go down the
20 subsets where they're saying the sick, the aged, the mentally
21 ill, or defective, and it's the mentally ill or defective. I
22 think the mentally means mental -- the mentally ill or mentally
23 defective, and there's a provision that does define the
24 mentally defective as of certain I.Q. It's just not that
25 you're a defective person.

1 THE COURT: There's not -- I suppose there's not
2 legislative history on this exact point, is there? No one's
3 given me any specific --

4 MS. RINGSTAD: On whether or not --

5 THE COURT: How you define these words. Sometimes a
6 congressman stands up or senator at a hearing and says, well,
7 make sure we understand, but that --

8 MS. RINGSTAD: You know, there was in 1966, and at
9 that time, institutions were probably referred to as
10 institutions, not as homes, and diagnoses I think are much more
11 common that are much broader (indiscernible) all these
12 emotional disturbances that may be -- attention deficiencies, I
13 don't know how many of those even existed in 1966. So, I don't
14 know if they felt the need to really define the mental illness.

15 If you look at the state statute that talks about
16 mental illness, it's:

17 "A mental or emotional impairment that has a
18 substantial adverse effect on an individual's ability
19 to exercise conscious control and the individual's
20 actions or ability to perceive reality or delusion or
21 to understand."

22 And that is how the state defines mental illness.

23 These kids don't even qualify -- none of these kids
24 would qualify under that definition of mental illness. These
25 kids -- most of the kids don't even qualify for services

1 provided by the school district.

2 THE COURT: Okay. You've given me a lot to think
3 about. Do I have a verdict by any chance?

4 THE CLERK: No.

5 THE COURT: Oh. Okay. Anyone else -- any final
6 words?

7 MR. LOGAN: You don't really want to do that to me,
8 do you?

9 THE COURT: No, I don't.

10 MR. LOGAN: I mean, I've got a couple, but --

11 THE COURT: No, I -- I -- and it's been thoroughly
12 briefed and -- and I've read all this stuff before I came up.
13 I've still got to do some more thinking, but my law clerk is
14 listening, too, and I'm sure she's got the answer just as --
15 just like that.

16 MR. LOGAN: Don't they always?

17 THE COURT: Yeah. Okay. Have a great warm
18 afternoon. We'll talk to you later.

19 MR. WALLACE: Thank you very much, Your Honor.

20 MR. LOGAN: Thank you, Judge Beistline, and Happy New
21 Year.

22 THE COURT: All right.

23 THE CLERK: All rise. This matter is now adjourned.
24 Court stands in recess until 1:30.

25 (Proceedings concluded at 11:47 a.m.)

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CERTIFICATE

I certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

/s/ D. Kathleen Stegmiller
D. Kathleen Stegmiller, Transcriber

08/29/09
Date